2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 2

DEVELOPMENTS IN PRETRIAL PROCEDURES

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DEVELOPMENTS IN PRETRIAL PROCEDURES

Outline of Instruction

I. INTRODUCTION.

II. COURT PERSONNEL AND PANEL SELECTION ISSUES.

A. Review: An accused has a qualified right to have his case reviewed by an impartial convening authority (CA). Cf. *United States v. Nix*, 40 M.J. 6 (C.M.A 199). A CA may have her discretion limited if she has acted in some fashion that is inconsistent with the impartiality of a CA. A CA may, for example, become an "accuser." An accuser is a person who (1) signs and swears to charges, (2) directs that charges nominally be signed and sworn to by another, or (3) who has an interest other than an official interest in the prosecution of the accused. Article 1(9), UCMJ. See also RCM 601(c) Discussion.

1. A CA who is an accuser is disqualified from referring a case to a SPCM or a GCM. Articles 1(9), 22(b) and 23(b), UCMJ; RCM 601(c). The CA may dispose of the case administratively or dismiss the charges but, if she wishes the case to be tried by a general or a special court-martial, she must forward the case to the next higher commander, noting her disqualification. Articles 22(b), 23(b), UCMJ; RCM 401(c)(2)(A); 601(c).

2. A CA-accuser may be disqualified in either a "statutory" sense (e.g., having sworn the charges) or in a "personal" sense (by virtue of having an other than official interest in the case). McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997). Whether the CA is statutorily or personally disqualified will determine the option available to the CA concerning a particular case.

   a. Statutory disqualification. McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997): A convening authority who becomes an accuser by virtue of preferring charges is not, per se, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges.

b. Personal disqualification: Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case. *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

(1) *United States v. Tittel,* 53 M.J. 313 (2000): Accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court's reasoning that the order was a routine administrative directive and that the CA was not an "accuser" and that, in any event, the accused waived the issue.

(2) *United States v. Haagenson,* 52 M.J. 34 (1999): Case remanded for fact-finding proceeding on issue of whether SPCMCA became an accuser. Accused was a warrant officer. SPCMCA originally referred the accused's case to a SPCM, but withdrew it and forwarded it with recommendation for GCM. Accused alleged on appeal the case was withdrawn and forwarded because base commander's XO, who was the SPCMCA's superior, told SPCMCA "I want [accused] out of the Marine Corps."

3. Failure to raise issue at trial may result in waiver.

a. *See Tittel; United States v. Voorhees,* 50 M.J. 494 (1999): A convening authority is an "accuser" when the convening authority is so closely connected to the offense that a reasonable person would conclude that the convening authority had a personal interest in the matter - that it would affect the convening authority's ego, family, or personal property, or that it demonstrates personal animosity beyond misguided zeal (Here, convening authority did not become an accuser even though he may have threatened to "burn" accused if he did not enter into pretrial agreement; even if he did, the issue was waived).

B. Panel Selection Issues.

a. Convening authority must personally select panel members using the criteria set forth in Article 25, UCMJ. RCM 503(a): "The convening authority shall detail qualified persons as members for courts-martial." The CA must determine who in the CA's *personal* opinion are "best qualified" under the criteria set out in Article 25, UCMJ:

***J*udicial Temperament**
***E*xperience**
***T*raining**
***A*ge**
***L*ength of Service**
***E*ducation**

b. Congress considering random selection.

(1) National Defense Authorization Act for 1997, Section 561. This section required the Secretary of Defense to develop a plan for random selection of members of courts-martial as a potential replacement for the current selection process and present the plan and views of the code committee to the Senate Committee on Armed Services and the House Committee on National Security. The Joint Service Committee has concluded that, after considering six alternatives, the current practice of CA selection best applies the criteria in Article 25(d) in a fair and efficient manner. In Fall 1999 the JSC study was forwarded by the SECDEF to Congress.

2. Inferences of impropriety in the selection based on the array.

a. *United States v. Bertie,* 50 M.J. 489 (1999): Defense challenged selection of panel as improperly selected on the basis of rank (no member was below the grade of O4 or E8). The court noted that deliberate and systematic exclusion of lower grades and ranks is not permissible, nor may the convening authority purposefully stack a panel to achieve a desired result. However, the mere presence of senior ranking members does not create a presumption of court stacking or use of improper selection criteria. The court held there was no evidence presented to establish a court-stacking claim.

3. Inferences of impropriety in the selection based on the nomination process.

a. *United States v. Upshaw*, 49 M.J. 111 (1998): Believing the accused was an E6, the SJA sent out memorandum seeking nominees from the SPCMCAs, requesting nominees in the grade of E7 and above. The court found no error. An element of "court stacking" is improper motive; none was shown here. Defense conceded that the exclusion of technical sergeants (E6) was "just simply a mistake." The CAAF found the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

b. *United States v. Roland,* 50 M.J. 66 (1999): The SJA solicited court-martial panel nominees by asking that subordinate commanders recommend qualified personnel in grades "E5 to 06." The subsequent memorandum transmitting the list of nominees to the GCMCA indicated that he was not limited to the proposed enlisted members, but could select any enlisted members from his command, provided they met the Article 25 criteria. The court noted that once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred. Here, the court held that the defense had not carried its burden to show that there was unlawful command influence. The record establishes that there was no indication of impropriety in the selection of members. CA convening a court-martial must personally detail panel members.

c. *United States v. Kirkland,* USCA Dkt. No. 99-0651/AF (June 1, 2000): The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, E-7 but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. There was no rank listed below E-7. No one below E-7 was nominated or selected for the panel. The CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "'reversal of the sentence is appropriate to uphold the essential fairness. . . of the military justice system.'"

C. Limitations on Joint Commanders.

1. *United States v. Egan*, 53 M.J. 570 (Army Ct. Crim. App. 2000): In a SPCM convened by Air Force colonel (commander of a EUCOM joint unit) accused (soldier) was convicted of drug use and distribution. SPCMCA approved the sentence, which included a BCD. ACCA: The SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. BCD set aside; case further modified on other grounds.

III. COUNSEL.

A. Qualifications.

1. GCM. UCMJ art. 27(b): "Trial counsel . . . detailed for a general court-martial--

a. must be a judge advocate . . . and

b. must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

2. *United States v. Steele,* 53 M.J. 274 (2000): No error where accused's civilian DC was carried "inactive" by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by MJ qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."). Counsel are presumed competent once licensed.

3. *United States v. McClain*, 50 M.J. 483 (1999): Accused complained his lawyers were conspiring with the trial counsel. The accused also had several disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told "lies here today in court." Nevertheless, the military judge denied counsel's request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused's assertions.

4. *United States v. Thompson*, 51 M.J. 431 (1999): A pretrial complaint against defense counsel, made by appellant's wife, did not create a conflict of interest disqualifying him from further participation in this case. The court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

5. *United States v. Johnston*, 51 MJ 227 (1999): Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for appellant deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to appellant's substantial rights.

6. *United States v. Murphy,* 50 MJ 4 (1998): The Government called Private (PVT) French as a witness against appellant. French had been one of appellant's pretrial cell mates in the Mannheim Correctional Facility. French allegedly overheard the accused make incriminating comments to another inmate. French related this conversation to his lawyer, CPT S, who later negotiated a PTA for French. CPT S then moved to withdraw from French's case. Later, at accused's trial, French testified. The military judge was the same judge who had presided over French's trial. Defense counsel, of whom CPT S was one, did not impeach the testimony of French, although he had recently been convicted of several crimes involving dishonesty and deceit. Neither counsel nor the military judge discussed the potential conflict of interest on the record. The military judge had a *sua sponte* duty to resolve conflict questions on the record, and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. The court held that, assuming there was a conflict of interest, it had no impact on the merits portion of the trial, since French's testimony was mostly cumulative. However, the court was less convinced of the lack of impact on the sentence. Case returned to the Army for further proceedings.

7. U*nited States v. Allred,* 50 M.J. 795 (N.M. Ct. Crim. App. 1999): A preexisting attorney-client relationship may be severed by government only for good cause. "Good cause" did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC's commander's finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

8. *United States v. Reist*, 50 M.J. 108 (1999): Assistant TC, a LTC and Director of a Law Center, had signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), but the court held defense waived the issue, and found no plain error.

IV. COURT MEMBERS.

A. Voir Dire.

1. Control of voir dire.

a. *United States v. Pauling*, Army 9700685 (Army Ct. Crim. App. 15 July 1999) (unpub.). Military judge did not abuse his discretion in prohibiting defense counsel to ask, on voir dire, questions from a member concerning the impact of rehabilitative potential testimony.

b. *United States v. Belflower*, 50 M.J. 306 (1999): Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

B. Challenge for Cause.

1. Bases – Actual and Implied Bias.

a. Challenge for cause based on actual bias is one of credibility and is reviewed for an abuse of discretion. Credibility is a *subjective determination* viewed through the eyes of the military judge. The military judge's opportunity to observe the demeanor of court members will be given "great deference" on appellate review.

b. Challenge for cause based on implied bias is reviewed on an *objective standard* through the eyes of the public. Would a reasonable member of the public have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings?"

c. *United States v. Minyard*, 46 M.J. 229 (1997). The military judge should have granted challenge for cause against member whose husband investigated case against accused. A challenge for cause based on actual bias is resolved based on credibility. The military judge's credibility determination will be given great deference on review. A challenge for cause based on implied bias is reviewed under an objective standard viewed through the eyes of the public.

d. *See also United States v. Napoleon*, 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, the military judge properly denied challenge for cause against member who had: *official* contacts with special agent-witness who was "very credible because of the job he has"; and knowledge of case through a staff meeting).

2. Actual Bias.

a. *United States v. Warden*, 51 M.J. 78 (1999): Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial.

b. *United States v. Napolitano,* 53 M.J. 162 (2000): Where member indicated on questionnaire disapproval of civilian DC's behavior in another case, military judge did not abuse discretion in denying challenge for cause; member retracted opinion, stated he was not biased against CDC.

3. Implied Bias.

a. *United States v. Schlamer*, 52 M.J. 80 (1999): Military judge did not abuse his discretion in denying challenge for cause against member who expressed severe notions of punishment ("rape = castration") and granting challenge against member who had received an Article 15 and did "not feel comfortable" sitting in judgment. As to former, military judge found she had not made up her mind and "I believe her;" as to latter member, military judge's grant was in keeping with liberal grant mandate.

b. *United States v. Henley*, 53 M.J. 488 (2000): LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

c. Sentencing and "inflexibility."

(1) *United States v. Rolle*, 53 M.J. 187 (2000): Accused, a Staff Sergeant, pleaded guilty to use of cocaine. Much of *voir dire* focused on whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, CSM L stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." (Although CSM L did note there was a difference between a discharge and an administrative elimination from the Army). Another member, SFC W, stated "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty."

(a) The military judge denied the challenges for cause against CSM L and SFC W; the CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying. *United States v. Jefferson*, 44 MJ 312, 319 (1996); *United States v. Tippit*, 9 MJ 106, 107 (CMA 1980). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan*, 7 MJ 205, 206 (CMA 1979).

(b) The CAAF found no error, noting the court was reluctant "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share -- such as that a convicted drug dealer should not remain a noncommissioned officer or should be separated from the armed services -- must automatically be excluded if challenged for cause [citations omitted].'" The members did not express a predisposition toward a particular punishment but agreed to follow the military judge's instructions and to not completely exclude the possibility of no punishment. "[W]e have another case of responses to 'artful, sometimes ambiguous inquiries' that do not require the military judge to grant a challenge for cause [citations omitted]."

(2) *United States v. Armstrong,* 54 M.J. 51 (2000): LCDR T stated during voir dire that he worked with SA Cannon, the lead investigator in accused's case. SA Cannon sat at counsel table as a member of counsel team during trial and testified. LCDR T stated he was in intelligence and not law enforcement, that he had no personal involvement in accused's case but had heard it discussed in meetings. He said he could put that aside. The military judge denied the challenge for cause, finding no actual bias. Defense appealed alleging implied bias. The Coast Guard Court, exercising its *de novo* power of review, the court set aside the findings and sentence based upon implied bias. The government argued that the court should test only for plain error, the theory being that defense need not specifically invoke implied bias. The CAAF noted a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, and that the CG court did not err in applying RCM 912(f)(1)(N).

B. Peremptory challenges.

1. Peremptory challenges do not have a constitutional foundation. *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000).

2. Order of challenges.

a. *United States v. Gray*, 51 M.J. 1 (1999): The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither *Ford*, nor any other case invalidates this judgment of Congress and the President.

3. *Batson v. Kentucky,* 486 U.S. 79 (1986): The Supreme Court held that a party alleging that an opponent was exercising peremptory challenges for the purpose of obtaining a racially-biased jury had to make out a *prima facie* showing of such intent before the party exercising the challenges was required to explain the reasons for the strikes (prosecutor had used peremptory challenges to strike all four of the African-Americans from the venire, with the result that Batson, an African-American, was tried by an all-white jury)).

a. *Batson* in the military. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge. *United States v. Moore,* 28 M.J. 366 (C.M.A. 1989) adopted a *per se* rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel."

b. The accused and the challenged member need not be of the same racial group. *Powers v. Ohio,* 499 U.S. 400 (1991). However, the challenged member must be in the *minority* on the panel (in other words, *Batson* would not apply if the majority of the panel was made up of, say, African American soldiers; *see United States v. Ruiz,* 49 M.J. 340, 344 n. 2 (1998)).

c. *Batson* has been applied to gender-based challenges. *JEB v. Alabama*, 511 U.S. 127 (1994). *JEB* has been applied to the military, and it applies to both trial and defense counsel. *United States v. Witham,* 47 M.J. 297 (1997).

d. There is a different standard for the *government* counsel responding to a *Batson* challenge. A trial counsel who is required to give a race- or gender-neutral reason must give a reason that is not implausible or unreasonable. *United States v. Tulloch,* 47 M.J. 283 (1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elm,* 514 U.S. 765 (1995).

e. *United States v. Norfleet*, 53 M.J. 262 (2000): TC challenged the sole female member of the court and, in response to DC's request for a gender-neutral explanation, stated the member "had far greater court-martial experience than any other member" (and would dominate the panel), and she had potential "animosity" toward the SJA office. Failure of the MJ to require TC to explain "disputes" between member and OSJA was not abuse of discretion. When proponent of peremptory challenge responds to Batson objection with 1) a valid reason and 2) a separate reason that is not inherently discriminatory and on which opposing party cannot demonstrate pretext, denial of Batson may be upheld on appeal.

f. *United States v. Chaney*, 53 M.J. 383 (2000): The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

g. *United States v. Robinson,* 53 M.J. 749 (Army Ct. Crim. App. 2000): Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

V. MILITARY JUDGE.

A. *United States v. Norfleet*, USCA Dkt. No. 98-1131 (August 16, 2000): Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an AF paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of AF judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of MJ's superiors taking themselves out of the decision making process, the full disclosure of the MJ, and opportunity provided to DC to voir dire the MJ, the accused received a fair trial by an impartial MJ.

B. *United States v. Thompson,* 54 MJ 26 (2000): Military judge whose conduct consisted of inappropriate and intemperate statements to DC did not depart from his impartial role to such an extent as to require his recusal. The military judge became concerned with military defense counsel's repeated statements on the record that, since she had become intimidated by the military judge's treatment of her, she was "ineffective." The military judge was concerned with the impact these statements might have on appeal. The military judge was aware that military defense counsel formerly worked at "Defense Appellate Division" and was knowledgeable in ways of preserving issues for appeal. The record reflected the military judge's efforts to clarify and remedy concerns about admissions of ineffectiveness. "While nerves may have become frayed" during this give-and-take between the judge and defense counsel, the CAAF did not find it extraordinary. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

C. *United States v. Lynn,* USCA Dkt. No. 97-1482 (September 29, 2000): Appellate military judge, who had served as Chief, Appellate Government Division, during the time when the accused's record of trial was received by that office, did not abuse his discretion in failing to recuse himself from participating in the case on appeal. The judge had decided not to recuse himself unless an accused filed a brief raising an assignment of error with the Court of Criminal Appeals on or before the day he left the Appellate Government. Since the practice at Appellate Government was to not review the record in such a case until such a brief was filed, or until there was an eighth request for an enlargement of time, and in view of his unrebutted statement that he had no involvement in the present case while at Appellate Government, the CAAF held that a reasonable person would not question the judge's ability to be impartial in the review of accused's case.

D. *United States v. Burton*, 52 M.J. 223 (2000): None of the military judge's questions reflect an inflexible predisposition to impose a bad-conduct discharge. The military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

E. *United States v. Ford*, 51 M.J. 445 (1999): Where government expert testified as to the explosive capabilities of material found in accused's room, the defense failed to make a proper showing of necessity for expert assistance; the defense essentially sought expert assistance to determine whether the government's expert could be contradicted, and there was no showing that the defense had made any effort to find such an expert. The military judge did not abuse his discretion in denying defense's request for appointment of an explosive expert to assist the defense.

F. *United States v. Gray*, 51 M.J. 1 (1999): The accused has a right to necessary investigative assistance, not an unrestricted right to search for any evidence which might be relevant to his case. Here, a substantial basis existed for military judge to deny the defense request for appointment of an investigator to defense team. Defense requested assistance from CID, who went beyond defense counsel's request and questioned a host of other potential witnesses and suspects, to include an entire firm of taxi drivers and appropriate police units, as well as other investigative agencies. "Simply because the results of these inquiries were not helpful to the defense does not render these efforts ineffective or provide a concrete explanation for further assistance."

G. *United States v. Barron*, 52 M.J. 1 (1999): The military judge did not abuse his discretion in denying motion for mistrial where government expert witness passed notes to trial counsel during cross examination of the defense expert. Even though the military judge acknowledged that the expert had virtually become a member of the prosecution team, a mistrial was not *per se* required. Moreover, the judge gave an extensive instruction noting that the expert had a "mark against" her, and granted the defense's alternative request to fully cross-examine this prosecution expert and reveal her pro-prosecutorial conduct to the members. Any bias, beyond that normally attributed to the party who called her, was therefore fully disclosed to the members.

H. *United States v. Harris*, 51 M.J. 191 (1999). The military judge in a child sexual abuse case did not abuse his discretion when he did not declare a mistrial after the government improperly elicited inadmissible credibility testimony and uncharged misconduct evidence from the prosecution's expert witness. The expert was questioned concerning the credibility of the alleged victim and she disclosed alleged threats by the accused. The defense objected, the members were instructed to disregard the question and answer, and, ultimately, trial counsel was removed from the direct examination. Defense counsel stated the accused wished to go forward with the trial and not move for mistrial. The court found no prejudicial error in the manner in which the military judge dealt with the improper credibility evidence or the evidence of alleged threats made by appellant.

I. *United States v. Spann,* 51 M.J. 89 (1999). Where the accused was charged with rape of Ms. R., the military judge erred when he applied the Congressionally-passed "victim of crime bill of rights," 42 U.S.C. Section 10606. During the government's rebuttal case, while a government rape trauma expert was testifying, the complainant and her mother entered the courtroom. The defense moved to sequester the complainant, but the military judge denied the motion based on Section 10606's entitlement for victims who might testify on sentencing to attend all proceedings. The CAAF held this was error, since the statute pledges only the "'best efforts' of certain executive branch personnel to secure the rights listed." The statute did not supplant Mil. R. Evid. 615. While Fed. R. Evid. 615 has been amended, providing an exception to the automatic exclusion provision in Rule 615 for "a person authorized by statute to be present," that amendment has not been adopted in the military. If no action is taken by the President, the amendment will take effect in the military justice system in accordance with Mil. R. Evid. 1102 on 1 June 2000.

J. *United States v. Howard*, 50 M.J. 469 (1999): Accused was convicted at a special court-martial of one specification of AWOL. The military judge who presided had also presided at a prior trial in which the accused was convicted of assault. The military judge announced this on the record at the beginning of trial but the accused maintained he wished to proceed with the present judge. During the defense case on sentencing in the AWOL case, the defense introduced the accused's version of the events underlying the prior convict, and defense argued on sentencing that the facts underlying that conviction showed that accused was only trying to "[do] the right thing in looking out for his junior Marines." The military judge interrupted defense counsel and stated that, although he had awarded appellant "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground, unable to get up. The CAAF held that there was no error: the military judge was under no obligation to recuse himself; he had noted at the beginning of trial his memory of the prior case and defense had indicated its desire to proceed with him. The accused waived his objection to the presence of the military judge.

K. *United States v. Short*, 50 M.J. 370 (1999): The military judge did not err in denying the defense's request for appointment of a government urinalysis expert to assist the defense. Defense counsel refused to talk to the government expert witness, and insisted that he could not support the defense theory, but the witness testified on cross-examination that accused's urinalysis results were consistent with passive inhalation or innocent ingestion. Further, the military judge suggested counsel consult with more experienced counsel and talk to the government expert about the science involved. The military judge gave defense counsel "the tools potentially to gather evidence to lay a foundation for the necessity of an independent [assistant]." Ultimately, defense counsel cross-examined the government expert exhaustively, elicited potentially damaging admissions about problems with testing accuracy in his laboratory, and elicited scientific support for the defense theory of innocent ingestion.

L. *United States v. Watt,* 50 MJ 102 (1999): The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge. (Sullivan, J., dissented, finding waiver and no prejudice).

M. *United States v. Cooper,* 51 M.J. 247 (1999). Military judge's making allegedly inappropriate comments to defense counsel did not plainly cause him to lose his impartiality or the appearance of his impartiality. The military judge's comments included repeating before the members the fact that defense had "thank[ed] [him] for helping perfect the government's case" through questions of a government witness. Next, the military judge commented disparagingly on the poor quality of the defense counsel's evidence (a videotape made by the accused's wife). The defense did not object to any of the comments, so the court reviewed only for plain error, finding that the military judge's questions were not inappropriate, that he explained the neutral intent of his questions and instructed the members that they should not construe his questions as being pro-prosecution. His expression of irritation with defense, although inappropriate before the members, did not divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of the defense evidence were not impermissible, because just as RCM 920(e)(7) Discussion permits the military judge to comment on the evidence during instructions, so should the military judge be allowed to comment on evidence during trial. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt by the judge's questions.

N. *United States v. Weisbeck*, 50 M.J. 461 (1999). In 1994, accused was tried by GCM for sexually assaulting two teenaged brothers, and he was acquitted. The key to the defense case in the 1994 court-martial was a psychiatric expert. In 1995, at another installation, accused was charged with offenses relating to two other adolescent boys. The military judge ruled the two boys from the 1994 could testify under Mil. R. Evid. 404(b). The civilian attorney from the 1994 court joined the defense team for the 1995 case in October, then requested a delay to permit attendance of the psychiatric expert used in the 1994 court. The military judge denied this request, and the CAAF held that this was error and that the defense request was not unreasonable. Findings and sentence set aside.

O. *United States v. Paaluhi,* 50 M.J. 782 (N.M. Ct. Crim. App. 1999): The military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against appellant and when he instructed appellant to assist the Government to procure the presence of the prosecutrix.

B. *United States v. Rivers,* 49 M.J. 434 (1998): The military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.

VI. OTHER COURT-MARTIAL PERSONNEL.

A. Staff Judge Advocates. *United States v. Jones,* 52 M.J. 60 (1999): Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of *de facto* immunity, that the President had not formulated rules governing such "informal immunity," but that there was no command influence and no material prejudice to the accused.

B. Article 32 officers and Article 32 investigations.

1. *United States v. Holt*, 52 M.J. 173 (1999): Art. 32 IO recommended accused's case be referred capital for his alleged murder of a fellow-biker. After referral, the Article 32 officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for the government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. The CAAF noted that an "investigating officer is disqualified" from acting subsequently "in the same case in any other capacity" under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found that the military judge committed no prejudicial error by admitting the scientific tests of the experts' testimony. Most importantly, the decision to submit the jeans for testing and to call the expert witnesses were solely the decisions of the prosecution .

2. *United States v. Diaz*, NMCM No. 00-0903 (N.M. Ct. Crim. App., 1 September 2000): After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

3. Civilian witnesses cannot be subpoenaed to appear at an art. 32 hearing. *Cf. United States v. Johnson,* USCA Dkt. No. 99-0092 (31 August 2000): Accused was convicted, primarily through testimony of his wife, of assaults on his eight month-old daughter. His wife testified against him at the Article 32 hearing, and later at trial. She appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing. The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.

VII. PLEAS.

A. Use of plea and providence inquiry.

1. *United States v. Fricke,* 53 M.J. 149 (2000): Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. MJ noted noncapital referral on record with no objection of parties.

2. *United States v. Langston,* USCA Dkt. No. 99-0419/AR (August 25, 2000): Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling, incorrectly, that Mil. R. Evid. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

3. Plea to a lesser included offense may be used to establish common elements of the greater offense. RCM 910(g).

a. Normally, when an accused pleads guilty to a lesser included offense, and the government intends to try to prove the greater offense before a panel, it is incumbent upon the military judge to instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. RCM 913(a) Discussion. In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. RCM 920(e) Discussion; *cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993). Should the military judge so instruct, it is generally considered error. *Id*.

b. *United States v. Smith*, 50 M.J. 451 (1999): The accused was charged with raping and sodomizing H, his stepdaughter. He was also charged with indecent acts arising from those offenses. He pleaded guilty by exceptions and substitutions to the indecent acts offense (this offense alleged that he had placed his fingers in to – and his penis upon - H's vagina and anus; the accused claimed that he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her). The accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from…June 1995 to … August 1995"). The military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). The CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of RCM 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea.

c. *See* Colonel Ferdinand D. Clervi*, Annual Review Of Developments In Instructions* — 1999, 2000 ARMY LAW., April, 2000, at 108 (*Smith* "is important in emphasizing the need for all parties to be clear and unambiguous when discussing proposed instructions").

4. *Providence inquiry admissions* should not be admitted on the merits of greater or other charges.

a. *Cf. United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996) (where accused pleaded guilty to lesser offense of wrongful appropriation and government went forward on greater charge of larceny, military judge erred in permitting witness to testify, on merits of greater charges, about accused's admissions during providency).

b. Air Force court does not read *Ramelb* to ban all admission of accused's providency statements. Statements made during a plea inquiry on a lesser included offense may be considered by the finder of fact as those facts relate to an admitted element. *United States v. Grijalva*, 53 M.J. 501 (A.F. Ct. Crim. App. 2000) (accused was charged with attempted premeditated murder; pleaded guilty to assault by intentional infliction of grievous bodily harm; military judge could accept as proven the fact that accused intended to shoot his wife).

c. *United States v. Nelson*, 51 M.J. 399 (1999): Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the ACCA decision on unrelated grounds.

VIII. PRETRIAL AGREEMENTS.

A. Permissible Terms and Conditions.

1. *United States v. McFadyen*, 51 M.J. 289 (1999): Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. As of 20 November 1999, for all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13, UCMJ. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (e.g., stripped of rank, prevented from contacting his attorney, and his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of the pretrial confinement in determining the amount of confinement appropriate as a punishment.

2. *United States v. Mitchell*, 50 M.J. 79 (1999): Accused was tried in 1986. Upon his release, the accused wrote over $30,000 in bad checks, was apprehended, and escaped. At his second trial, he negotiated a PTA in which he offered to plead guilty and make restitution within a year, in return for which the CA would suspend any confinement in excess of 60 months and suspend any period of a fine for the period of confinement plus 12 months. One year later, the accused had not made restitution. The CA took action, suspending the sentence, but ordered a vacation hearing. The CA found the accused had not made good faith efforts to make restitution and vacated the suspension. The accused argued he did not have the means to make restitution so the CA's action violated the agreement. The CAAF held the linchpin of the analysis is good faith and that the accused provided sketchy evidence of his net worth at the time of his court-martial and incomplete evidence at his vacation hearing. "The Due Process Clause does not protect an accused who offers to make full restitution, knowing full well that he cannot; nor does it protect an accused who fails to take timely and reasonable steps to safeguard his assets so that he can make restitution as promised." The CA was justified in concluding that appellant either bargained in bad faith by misrepresenting his net worth, or he failed to take reasonable steps to safeguard his assets and convert them to cash after he was convicted and sentenced.

B. Impermissible Terms and Conditions.

1. *United States v. McLaughlin*, 50 M.J. 272 (1999): Accused offered to waive a speedy trial issue in his pretrial agreement (accused had been in pretrial confinement for 95 days). The CAAF held that under the MCM this provision is unenforceable, so the military judge should have declared it impermissible, uphold the remainder of the agreement, and then ask the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95 day delay, no showing of prejudice. Nothing in record to support such a motion.

2. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998): Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The accused had been in pretrial confinement for 117 days at the time of arraignment. The court held that there was a colorable showing of a viable speedy trial claim and that it was not convinced this was harmless error. Finding and sentence set aside.

3. *United States v. Davis*, 50 M.J. 426 (1999): Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and to present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses). The CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See United States v. Bertelson*, 3 M.J. 314 (CMA 1977). The CAAF cautioned against the use of such a proceeding, which circumvented Article 45(a), but found that the accused's due process rights were not prejudiced, since the military judge properly conducted a *Bertelson* inquiry concerning the stipulation and it was clear the accused entered the agreement knowingly and voluntarily.

4. Stipulations of fact and polygraphs. *United States v. Clark,* 53 M.J. 280 (2000): Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into a "reasonable stipulations concerning the facts and circumstances" of his case. MJ at trial noticed the polygraph in the stipulation, noted that appellant had agreed to take a polygraph test and that the "test results revealed deception." There was no objection to the stipulation and he admitted the stipulation into evidence. Applying Mil. R. Evid. 707 and *United States v. Glazier*, 26 MJ 268, 270 (CMA 1988), the CAAF held that it was plainly erroneous for the military judge to admit the evidence of the polygraph, even via a stipulation. However, the facts of the case indicate the military judge did not rely upon the stipulation to accept appellant's pleas as provident. The accused suffered no prejudice.

C. Ambiguous Terms.

1. *United States v. Acevedo*, 50 M.J. 169 (1999): Accused entered into a PTA which provided that " a punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action." The military judge sentenced appellant to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, "there's nothing [in the PTA] about doing anything to a bad-conduct discharge so that is not suspended. Right?" to which both counsel agreed. The CA approved the BCD. The CAAF held that it appeared that all parties had the same understanding, i.e., that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment. *See also United States v. Gilbert,* 50, M.J. 176 (1999), a companion case to *Acevedo* (BCD could be approved; the military judge recommended suspension of the BCD, which would have been an empty gesture if the PTA already required it).

2. *United States v. Sutphin,* 49 M.J. 534 (C.G. Ct. Crim. App. 1998): Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the "amount of forfeiture or fine," and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated "any other lawful punishment (which shall expressly include, among others, any enforcement provisions in the case of a fine)." The military judge never inquired whether the accused understood a fine could be approved and imposed. The members adjudged a fine, which, the court ruled, must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

D. *Sub rosa* agreements.

1. *United States v. Sherman,* 51 M.J. 73 (1999): Accused pleaded guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF sets aside the ACCA decision and directed a *Dubay* hearing on whether there was a *sub rosa* agreement.

2. *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000): Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pleaded not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a sub rosa agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by RCM 705; it should have been in writing and disclosed at trial. Moreover, the TC should not have acted to bind the convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused.

E. Post-Trial Re-Negotiation of Pre-Trial Agreement.

1. *United States v. Pilkington*, 51 M.J. 415 (1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pleaded guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.

2. *United States v. Dawson,* 51 M.J. 411 (1999): Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 1.5 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. The CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

F. Unintended Consequences.

1. *United States v. Mitchell*, 50 M.J. 79 (1999): Impact of DoD regulation may invalidate plea. Accused's enlistment was almost over at the time of trial. After trial, he was placed in confinement. His attempt to extend his enlistment was, therefore, invalid, and he went into a no-pay status, thus mooting the PTA term limiting forfeitures. CAAF returned the case for a *Dubay* hearing; if the accused did not receive the benefit of his bargain, the pleas would be treated as improvident, and the findings set aside.

a. The Air Force court found that the approval of the accused's retirement was taken without regard to his pretrial agreement, but that, for a number of reasons, no further relief was required. *Mitchell*, 2000 CCA Lexis 150 (A.F. Ct. Crim. App., May 26, 2000) (unpub.).

2. *United States v. Williams,* 53 M.J. 293 (2000): Prior to trial accused was on legal hold after his term of service expired. Neither the Gov't nor Defense was aware of DOD Reg. which required forfeiture of pay and allowances of servicemembers on legal hold who are later convicted of an offense. Government conceded the PTA, which required the CA to disapprove forfeitures where none will exist after trial, invalidated the providence inquiry. CAAF agreed, case reversed, and rehearing authorized.

3. *United States v. Hardcastle,* 53 M.J. 299 (2000): Accused's PTA required CA to defer and waive forfeitures in excess of $400 per month. After court-martial, accused's enlistment expired, placing him in a no-pay status. The CAAF found the accused had not received the benefit of his bargain, and that the faulty provision had induced his pleas. Case reversed, and rehearing authorized.

IX. CONCLUSION.

X. SUMMARY SHEET.

Panel Selection	❧ A panel is improperly selected where the convening authority uses inappropriate criteria (e.g., rank) to systematically exclude an otherwise potentially qualified group of servicemembers. ❧ Generally, the fact that a panel consists of predominantly senior officers or commanders does not, by itself, raise a presumption of improper selection. ❧ The nomination documents may raise an appearance of exclusion where they purport to limit the pool from which nominees may be selected. *See Kirkland*, p. 5.
Pleas	❧ Where an accused enters mixed pleas and the prosecution goes forward to "prove up" the offense to which the accused pleaded not guilty, the jury will not be informed of the prior plea of guilty unless either 1) the accused requests that the panel be informed or 2) the accused pleaded guilty to a lesser offense. ❧ Providence inquiry admissions should *not* be admitted on the merits of a greater or other offense. *But see Grijalva*, p. 23.
Voir Dire and *Batson* Challenges	❧ Both the government and defense are entitled to one peremptory challenge. ❧ Where one party exercises a peremptory challenge against a female or a member of a minority group, the opposing party may lodge a *Batson* objection and require the counsel to state a race- or gender-neutral explanation. ❧ *Batson* only applies where the challenged panel member is in a minority on the *panel*. ❧ Where one party exercises a peremptory challenge against a female or a member of a minority group, the opposing party may lodge a *Batson* objection and require the counsel to state a race- or gender-neutral explanation. ❧ Where trial counsel exercises a peremptory challenge against a female or a minority member, and the defense makes a *Batson* objection, the trial counsel must give a race- or gender- neutral explanation that is reasonable and plausible. ❧ Where trial counsel exercises a peremptory challenge against a female or a minority member, and the defense makes a *Batson* objection, the trial counsel must give a race- or gender- neutral explanation that is reasonable and plausible. ❧ Occupation-based challenges are permissible. *See Chaney,* p. 14.